IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVEY L. THOMASON,

Appellant,

vs.

LENORE NESLER,

Appellee.

Case No. 02-CV-4185-JPG

Bankruptcy No. 01-60355

Adversary No. 01-6030

ORDER

GILBERT, District Judge:

This matter comes before the Court on the appeal of the debtor/appellant from a decision of the Bankruptcy Court, Judge Gerald D. Fines. The appellant has submitted a brief in support of his appeal, and the plaintiff/appellee has responded. For the reasons stated below, this Court will affirm the decision of the Bankruptcy Court.

BACKGROUND

The appellee, Lenore Nesler, obtained a $15,000.00 default judgment ($5,000 compensatory, $10,000 punitive) against the appellant/debtor Davey Thomason when Thomason did not show up in Wisconsin's Circuit Court for Dane County to defend against charges of sexual harassment and wrongful termination brought under Title VII of the Civil Rights Act of 1964.

Thomason subsequently filed for bankruptcy protection under Chapter 7, listing Nesler as a creditor. Nesler then filed an adversary proceeding objecting to the discharge of the debt owed to her. Specifically, Nesler argued, among other things, that the debt was nondischargeable under § 523(a)(6) of

the Bankruptcy Code, which provides that a discharge under Chapter 7 does not discharge a debt "for willful and wanton malicious injury by the debtor done to another entity . . . ." 11 U.S.C. § 523(a)(6). On April 19, 2002, the Bankruptcy Court conducted a trial to determine the dischargeability of the debt at issue.

At the trial, three witnesses testified: Nesler, Thomason, and Donna Langford. All three witnesses agreed that Nesler and Langford became employees of Madison Mazda Mitsubishi, Inc. in Madison, Wisconsin, within days of each other in August and September 1995. It was also undisputed that Thomason was the general sales manager at Madison Mazda and had authority over Nesler and Langford during their employment.

Nesler and Langford testified that Thomason conducted himself reprehensibly in several ways. They testified, consistent with one another, that Thomason called Nesler a "dumb cunt," a "fuckin' bitch," and a "fuckin' whore." Both Nesler and Langford testified that Thomason physically pinned Nesler at her desk on at least one occasion. Nesler testified that Thomason once showed her a photograph of a nude woman. According to Nesler, Thomason once threatened her with a handgun and then fired the gun over the head of another employee in order to prove that it was "real." Nesler testified that Thomason encouraged other employees to rape her. Ultimately, Nesler was fired shortly after bringing her grievances about Thomason to the owner of the car dealership.

Thomason, on the other hand, denied having any recollection of the events that Nesler and Langford testified about. Although he admitted having a firearm owner's permit, he denied that he ever owned a gun.

The Bankruptcy Court found the testimony of Nesler and Langford to be not only "credible," but also "straightforward and truthful." Based on Thomason's "lack of cooperation and lack of memory," the

Bankruptcy Court found that his testimony was not credible. Accordingly, on August 2, 2002, the Bankruptcy Court entered an order in favor of Nesler and against Thomason. Specifically, the Bankruptcy Court found, based on 11 U.S.C. § 523(a)(6), that the debt was nondischargeable.

STANDARD OF REVIEW

This Court reviews *de novo* a bankruptcy court's legal conclusions, and applies the deferential "clearly erroneous" standard to the factual findings. Bankruptcy Rule 8013; *In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). "[D]ue regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness." Bankruptcy Rule 8013.

In this case, Thomason does not contend that the Bankruptcy Court made any legal error. Moreover, Thomason does not contend that the testimony of Nesler and Langford, if true, is inadequate to establish the nondischargeability of the subject debt. Rather, Thomason merely argues that it was clear error for Judge Fines to find the testimony of Nesler and Langford credible.

DISCUSSION

A. Relevance of State Default Judgment.

As an initial matter, the Court will address the preclusive effect, if any, of the state default judgment. The doctrine of collateral estoppel, also known as issue preclusion, can be applied in nondischargeability proceedings under the Bankruptcy Code. *Grogan v. Garner*, 498 U.S. 279, 284 (1991). Here, however, Nesler's state case against Thomason was resolved by default judgment, and a default judgment is normally not given preclusive effect under the collateral estoppel doctrine. *In re Cassidy*, 892 F.2d 637, 640 n. 1 (7th Cir.), cert. denied, 498 U.S. 812 (1990). In any event, the appellee has not raised the issue, and,

therefore, the argument has been waived. *Kingman v. Levinson,* 114 F.3d 620, 627 (7th Cir. 1997) ("[I]ssue preclusion is a defense that can be waived by a party.").

Thus, the sole relevance of the state default judgment is that it establishes the existence of the $15,000.00 debt owed by Thomason to Nesler. The existence of the default judgment neither establishes nor suggests that the debt is for an injury willfully and wantonly inflicted by Thomason. To determine the applicability of § 523(a)(6), the Bankruptcy Court properly relied on the evidence taken at the trial of April 19, 2002. To determine whether the Bankruptcy Court's conclusion is clearly erroneous, this Court must rely on the parties' briefs and the trial transcript.

B. Finding of Willful and Wanton Injury

Section 523(a)(6) of the Bankruptcy Code provides that a debt "for willful and malicious injury by the debtor to another" is not dischargeable. 11 U.S.C. § 523(a)(6). "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

The word "injury" in (a)(6) includes non-bodily injury. *See In re Rosenberger*, 208 B.R. 445 (C.D. Ill. 1997) (collecting cases and holding that debtor "injured" the minor plaintiff by having sexual relations with her, even though there was no resulting physical injury).

The standard of proof for the dischargeability exceptions in § 523(a) is the preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279, 290-91 (1991). Thus, as creditor, at the bankruptcy proceedings, Nesler had the burden to prove by a preponderance of the evidence that Thomason owed her money because of an injury willfully and wantonly inflicted by Thomason. *In re Scarlata,* 979 F.2d 521, 525 (7th Cir. 1992).

Thomason argues that, for three reasons, it was clear error for the Bankruptcy Court to believe the

testimony of Nesler and Langford. First, Thomason notes that Langford never personally witnessed Thomason point a gun at Nesler or fire a gun over the head of an employee. Thomason contends that Nesler's eyewitness testimony about the same event is not credible, because: (1) Nesler continued to work at the dealership after the alleged incident, and (2) no report was made to the police regarding the alleged incident. The appellant's focus on discrediting testimony about the alleged gun incident is misplaced. Testimony about the gun incident is not crucial to Nesler's case. The subject debt arose out of a Title VIII suit for sexual harassment and retaliatory discharge. Thus, the key issue is whether the plaintiff has proved by a preponderance of the evidence that Thomason sexually harassed and wrongfully fired Nesler, thereby willfully and wantonly causing her injury.

Next, Thomason argues that if Nesler had really been harassed, she would have quit her job. She did not quit, and, therefore, according to Thomason, she must not have been harassed. Finally, Thomason argues that the most plausible explanation for Nesler's suit is that she brought it in retaliation for being fired.

This Court finds that it was not clear error for the Bankruptcy Court to reject these arguments and believe Nesler's story. There was reasonably credible evidence to support the trial court's finding that Thomason sexually harassed Nesler and that Nesler was fired in retaliation for making a formal complaint about Thomason's behavior. Giving due deference to the trial court's judgments about credibility, this Court is not left with a definite and firm conviction that a mistake has been made by the Bankruptcy Court.

C. Fairness of the Trial.

The appellant asserts that counsel for the plaintiff/appellee, on April 18, 2002, "made an ex parte telephone call to the trial court's chambers." According to the appellant, the appellee's counsel: (1) stated that Thomason was a "gun-toting man,"(2) stated that Nesler was afraid of Thomason, and (3) requested additional security in the courtroom. The appellant further asserts that the trial court immediately contacted

the appellant's counsel and conducted a telephone conference call, and, as a result of the conference, the trial court "ordered additional security." According to the appellant, the trial court was tainted by this process, and Thomason was denied a fair trial.

The appellant has not alleged anything amounting to improper conduct by the Bankruptcy Court, and this Court presumes that Judge Fines acted lawfully. *See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992); *Walton v. Arizona*, 497 U.S. 639, 653 (1990); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Finally, even assuming that Judge Fines ordered extra security for the trial of this matter, such action does not show that he was prejudiced against the appellant.

CONCLUSION

The Court hereby **AFFIRMS** the August 2, 2002 order of the bankruptcy court declaring, pursuant to 11 U.S.C. § 523(a)(6), that the plaintiff/appellee Lenore Nesler's Wisconsin default judgment for $15,000.00 against the defendant/appellant Davey Thomason constitutes a nondischargeable debt.

The Clerk of the Court is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

Dated: February 13, 2003.

/s/ J. Phil Gilbert
U.S. District Court